third party or parties controls or has the power to control both. . . ."[32] The regulations further explain the rationale behind the Small Business Administration test:

> Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.[33]

Under this test, an investor with less than 50% voting equity can have control. The percentage of the investment required to have control will vary on a case by case basis. Protection of small cable requires a flexible approach. Investors, however, will also require a degree of certainty as a prerequisite to investing time and effort into discussions regarding potential investments.

The Small Business Administration regulations were previously adopted by the Commission when determining whether affiliations existed among companies and their investors for Broadband PCS providers.[34] The purpose of those affiliation rules was to ensure that only truly small companies received PCS bidding preferences. The purpose of the affiliation rules under the Act is identical: To ensure that only truly small cable interests obtain greater deregulation. Adoption of applicable portions of the Small Business Administration regulations is appropriate and consistent with Commission precedent.

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[32] 13 C.F.R. § 121.401(a)(2)(ii).

[33] 13 C.F.R. § 121.401(c).

[34] *Fifth Report and Order*, In the Matter of Implementation of section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 (released July 15, 1994) at ¶¶204-217.

b. **The Commission Should Establish a Two-Tiered System to Create Certainty Among The Investment Community.**

To provide both flexibility and certainty, SCBA suggests a two-tiered test to determine whether an active investment will qualify as an "affiliation:"

(1) **20% and Less - Presumptive Safe Harbor.**

The Commission should declare that any voting interest of 20% or less shall not constitute an affiliation, absent a showing of de facto or de jure control.

(2) **20%-50% - Affirmative Showing of No Control.**

The Commission should permit operators to make an affirmative showing that voting equity interests above 20% but not more than 50% do not constitute an affiliation due to absence of actual control or the power to control

Some small cable companies have investors who take an active role in the operations of their cable systems. These relationships will more frequently rise to the level of an "affiliation" as contemplated by Congress.

E. **When an Affiliation Exists, the Commission must Exercise Care to Measure Only Relevant Revenues to Avoid Unnecessarily Foreclosing Access to Capital.**

Congress required more than the presence of a mere affiliation to disqualify a small cable company from receiving reduced regulatory burdens. The affiliation must be with an entity "whose gross annual revenues in the aggregate exceed $250,000,000."[35] Several key measurement issues, some of which have already been identified by the Commission, need to be resolved.

[35] 47 U.S.C. § 543(l)(B)(2).

1. The Commission's Proposed Definition of Gross Revenues Is Appropriate.

The Commission proposes using a previously promulgated regulation as the model to define gross revenues:

> Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.[36]

SCBA agrees that this traditional accounting definition of "gross revenues" is appropriate for purposes of the Act. SCBA takes exception, however, with the requirement of providing audited quarterly financial statements

Where questions regarding eligibility exist, the most recently compiled annual financial statements should provide adequate information. This avoids the cost of preparing quarterly statements solely for regulatory purposes. The Commission should not require audited statements as many such statements are not currently audited and having them certified would cost a considerable sum. SCBA suggests that operators provide published financial data where available, and rely on personally signed declarations should qualification questions arise.

SCBA suggests that to verify the gross revenue of natural persons investing in small cable companies that the Commission use the most recently filed federal income tax return to gauge the amount of gross revenues. This disclosure should be made only where serious questions arise as to whether the individual has gross revenues exceeding $250 million. Routinely, an individual should be permitted to submit a signed declaration, under penalty of perjury, that his/her gross annual receipts do not exceed $250 million annually

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[36] *NPRM* at ¶84, citing 47 C.F.R. § 76.720(f).

2. The Act Does Not Require Aggregation of Affiliate Revenue.

The Commission mistakenly states that "[t]he plain language of the statute appears to require an operator with multiple affiliates to aggregate the gross annual revenues of all of the affiliates and to compare this aggregate figure to the $250 million threshold."[37] This is one of two possible interpretations of the statutory provision. The provision states that a small cable company may:

> not [be] affiliated with any entity or entities whose gross annual revenues in the aggregate exceeds $250,000,000.[38]

A close examination of the clause shows its meaning. The phrase "entity or entities" clarifies that an affiliation with one or more disqualifying entities may prohibit a small cable company from availing itself of small cable relief. The word "aggregate" applies to the revenues of each entity individually. SCBA admits that two possible readings of the statutory language exist.[39]

The Joint Committee Report sheds further light on the meaning of the statute. It provides that a qualified small cable company may:

> not be affiliated with any entity whose annual gross revenues in the aggregate exceeds $250,000,000.[40]

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[37]*NPRM* at ¶86.

[38]47 U.S.C. § 543(l)(B)(2).

[39]Where an ambiguity exists and interpretation is necessary, the words of the statute should be interpreted in light of the purposes Congress sought to serve. *Norfolk, supra. See also Moskal v. United States*, 498 U.S. 103 (1990); and *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 124 L.Ed.2d 539, 567 (1993) ("Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative purpose as revealed by the history of the statute ....")

[40]Joint Committee Report, § 301.

This passage clearly indicates that Congress intended to disqualify a small cable company if it had an affiliation with **<u>any single entity with gross revenues exceeding $250 million</u>**. The Committee Report language uses the word "aggregate" in the context of a single entity, showing Congress' intent to merely require aggregation of the affiliates own revenues The Joint Committee Report does not support the Commission's tentative conclusion that the revenues of all affiliates be aggregated between affiliates.

SCBA's interpretation of this provision is also consistent with the overarching intent and purpose of the Act to provide relief to an increasing number of cable companies. The intent of Congress was to limit the eligibility of small cable companies that had affiliations with (i.e., were controlled by) very large enterprises. To require aggregation would deprive many other small cable companies of greater deregulation, contrary to the intent of Congress. Any company that needs to assemble a group of investors will more quickly trip over the $250 million gross revenue limitation.

The following example illustrates some of the problems created by aggregating gross revenues of affiliates:

> **<u>Example</u>**. Small Cable Company ("Small Company") has five equity investors who maintain active involvement in the management of the business. Four corporations each hold a 25% voting equity share. Each company has $100 million in gross annual receipts. Individually, each does not disqualify Small Company Together, however, the gross annual receipts total $400 million

One of the consistent reasons small cable companies have received relief in the past relates to difficulties small companies have attracting capital Presumably, if a small company is affiliated with a large company, the small company's access to capital will be enhanced. The above example demonstrates how the aggregation of revenues as proposed by the Commission gives a false positive indication. Aggregated, the gross revenues total $400 million. Yet, when each investor goes into the capital markets, it will receive treatment as a $100 million company. Congress intended that affiliation with a $100 million company should not disqualify a small cable company. The Commission should not strip away the benefits of such affiliations.

If the Commission still believes that it must aggregate the gross revenue of affiliates, it should at a minimum permit operators to compute the gross revenue attribution using a multiplication of the ownership interest of each affiliate. In the preceding example, each affiliate would have 25% of its gross revenues attributed to the cable operator, then 25% of each affiliate's gross revenue will flow into the gross revenue accumulation. Consequently, the aggregate gross revenues would total $100 million. If the Commission does not discount the gross receipts for smaller ownership percentages where multiple affiliates exist, small cable companies who must assemble consortiums of investors will likely find capital formation must more difficult, if not impossible.

3. The Act Excludes Revenues of the Cable Operator from the Gross Revenue Accumulation.

Including the revenues of cable operations in the affiliation gross revenue limit conflicts with the goals of Congress as most larger small cable companies will never qualify for small company status. Congress established a bright line initial qualification for small cable company status of 1% of national subscribers.[41] The Commission has determined that this amount initially totals 617,000 subscribers.

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[41] 47 U.S.C. § 543(l)(B)(2).

The subscriber cap and the gross revenue limit are interrelated. The 1% subscriber cap and the $250 million revenue cap are both indications of cable companies of approximately the same size. For example, a $250 million cable company with 617,000 subscribers, would have average monthly revenue from subscribers of $33.76.[42] Paul Kagan Associates estimates the 1996 average revenue per subscriber will be $32.69.[43] The similarity of these amounts is not coincidental.

If the Commission includes cable company revenue in the aggregation, the larger the cable company, the smaller the size of its affiliates. This effect, as shown in the following table, serves no public policy interest. Rather, it conflicts with the public policy goals articulated by Congress:

Subscribers	**Cable Revenues**	**Affiliate Revenues**	**Total Revenues**
10,000	$3,922,800	$246,077,200	$250,000,000
200,000	$78,456,000	$171,544,000	$250,000,000
400,000	$156,912,000	$93,088,000	$250,000,000
600,000	$235,368,000	$14,632,000	$250,000,000
617,000	$242,036,760	$7,963,240	$250,000,000

Including the cable operating revenues in the revenue aggregation renders the 1% subscriber cap redundant and therefore superfluous.[44] As the size of the cable operator grows, its ability to attract capital from qualified investors shrinks. As the table shows, a 600,000 subscriber cable

[42]$250 million/617,000 subscribers/12 months.

[43]Paul Kagan Associates, Inc., *The Cable TV Financial Databook*, July 1995 at 8.

[44]The legislature is presumed to have inserted every word and clause of a statute for a purpose and the statute must be construed to give effect to every word and clause. *Moskal, supra.* A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. *United States v. Powers* 307 U.S. 214 (1938).

operator has a business grossing approximately $235 million. Yet it can only seek investments from companies with 94% lower revenues than the cable company! These very small companies will not have capital available to invest in small cable. As a practical matter, no company with over 300,000[45] subscribers would ever qualify for small company treatment

This same analysis supports the proposition that Congress intended the $250 million gross revenue limitation to apply to individual companies, not cumulatively

4. Qualification of Related Entities Should Be Determined on an Entity by Entity Basis.

Many MSOs operate systems that are owned by different investment groups. Unlike the largest MSOs that typically operate under a parent-subsidiary structure, often the company bearing the MSO name is nothing more than a management company The management company may have some degree of equity investment in each cable system group, or may be the general partner of the limited partnerships.

Focusing on the relationship between the cable operator's systems and the investor, some investors may have more than $250 million in gross annual revenues, potentially disqualifying that system from receiving small cable regulatory relief If a particular group of systems with common investors is disqualified, that disqualification should not impute to the balance of the systems. Each financially autonomous system should receive a separate evaluation to determine its eligibility for small cable relief under the Act.

[45]At approximately 300,000 subscribers, the cable operator size begins to exceed the size of the investing entity.

IV. FRANCHISE SIZE, NOT SYSTEM SIZE, IS THE RELEVANT UNIT OF MEASURE TO IDENTIFY AREAS IN WHICH REGULATORY RELIEF MAY BE AVAILABLE.

SCBA agrees that the plain words of the statute make system size irrelevant. The statute provides that the areas eligible for reduced regulatory burdens are those "franchise area[s] in which that operator services 50,000 or fewer subscribers."[46] The only relevant measure of local service area relevant is the franchise.

As a consequence, a system serving multiple franchise areas could have more than 50,000 subscribers and still qualify. Further, a system could qualify in franchise areas with fewer than 50,000 subscribers and not in other franchise areas with more than 50,000 subscribers.

The Commission must measure these subscribers in terms of equivalent basic subscribers, also referred to as equivalent billing units. The standard unit of measure in the cable industry is the equivalent basic subscriber. When reviewing cable industry data, Congress would have examined statistics computed using equivalent basic subscribers. Similarly, the Commission has adopted an equivalent basic subscriber measure to determine company size qualification. To ensure uniformity of information and application under the law, the Commission should allow operators to use the equivalent basic subscriber measure when determining franchise area qualification.

V. DEREGULATION PROCEDURES: THE COMMISSION SHOULD ADOPT STREAMLINED CERTIFICATION PROCEDURES.

The Commission seeks comment on a procedural mechanism through which an operator can obtain a determination of small operator status.[47] Such procedures should result in a prompt decision

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[46]47 U.S.C. § 543(m)(1).

[47]*NPRM* at ¶ 90

with a minimum of paperwork, while allowing LFAs and the Commission the ability to verify subscriber and revenue data only when necessary. SCBA proposes below a procedural mechanism tailored to these requirements.

A. Small Systems That Were Basic Only Systems as of December 31, 1994 Are Deregulated.

As a preliminary matter, SCBA supports the Commission's conclusion that deregulation for basic only systems under Section 301(c) "depends solely upon the number of tiers that were subject to regulation as of December 31, 1994."[48] Neither the language of Section 301(c) nor the legislative history support a contrary conclusion. Similarly, there are no sound policy reasons to support application of the "change in the fundamental nature of the tier" test for any additional tiers that were launched after December 31, 1994. The statute aims to provide greater deregulation for small cable and should not be interpreted to exclude companies from deregulation because a NPT was launched or a tier restructuring occurred in 1995. The statute directs a bright line test. If a cable company satisfies the size and affiliation standards and offered only basic service as of December 31, 1994, it is deregulated.

B. Certification Procedures Should Be Streamlined and Include Protection from Unreasonable Information Requests.

1. A Simple Declaration Initiates the Procedure.

SCBA supports the Commission's proposed certification procedures,[49] with modifications. As proposed by the Commission, an operator may submit a certification to an LFA at any time. <u>The</u>

[48] *Id.*

[49] *Order* at ¶¶ 28-30

Commission should specify that an operator may submit the certification in the form of a simple declaration.

2. LFAs Must Decide Within 60 Days.

To streamline the procedure, the Commission should reduce the decision time to 60 days from the time of filing of the certification. This will better balance the operator's need for prompt local action and certainty in regulatory status than the proposed 90 days. An even more rapid approach would be to reduce the decision time to 30 days, the same number of days for the Commission to consider an LFA's certification to regulate basic rates. SCBA understands that due to the schedules of many municipal governments, a 30-day window may prove too abbreviated. If an LFA does not render a decision in 60 days, the declaration shall be deemed approved.

3. Protection Against Unreasonable Information Requests.

The Commission should provide procedural protection for cable operators that may be subject to unreasonable information requests by LFAs. As in Form 1230 rate regulation, the Commission should urge LFAs to carefully limit their requests for information.[50] If a cable operator believes that a request by an LFA for additional information to support a deregulation certification is unreasonable, the operator may file an interlocutory appeal with the Commission. The Commission shall act promptly on the appeal and may approve the declaration, rule on the appeal or remand the case to the LFA.

[50] *Small System Order* at ¶ 65.

4. The Procedure Shall Also Apply in Cases Involving Proposed CPST Complaints.

The Commission should specify that the above procedures also apply when an operator files a declaration in response to an LFA's notice that it intends to file a CPST rate complaint. The LFA will have either 60 days to grant the certification, withdraw notice of its complaint, or file its complaint and place the case before the Commission

C. The Procedures Should Apply to All Certifications of Small Cable Company Status.

SCBA discourages the Commission from establishing distinct procedures for small cable companies that "clearly qualify" and other procedures where qualification questions come closer to the statutory criteria. The combination of a 60 day decision window, a tolling period for legitimate information requests, and an interlocutory appeal route to the Commission will ensure prompt and reasonable decisionmaking. In rare cases where these procedures do not serve a particular LFA or cable operator, they may take the case to the Commission on a petition for special relief. The possibility of such cases should not discourage the Commission from establishing a streamlined means of obtaining deregulated status with a minimum of paperwork.

VI. EFFECTIVE COMPETITION: THE COMMISSION SHOULD RETAIN ITS CURRENT DEFINITION OF "COMPARABLE PROGRAMMING".

SCBA comments on the Commission's proposed definition of "comparable programming" for the new prong of the effective competition test. The interim rules and the proposed rules will create unnecessary burdens on small cable and will be subject to manipulation by competitors. To avoid these consequences, the Commission should retain the existing definition of "comparable programming," with a slight modification.

A. Comparison of Definitions of Comparable Programming.

Section 301(b)(3) of the Act adds a new test for effective competition. A key element of this test is that LEC-delivered programming be "comparable" to that of the cable operator. The Conference Report defines "comparable programming" in this context as "access to at least 12 channels of programming, at least some of which are television broadcasting signals."[51] This definition generally aligns with the current definition of "comparable programming" for the competitive provider prong of the effective competition test

> In order to offer comparable programming within the meaning of paragraph (b)(2)(i) of this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of non-broadcast service programming.[52]

The *Order* adopts an interim rule defining "comparable programming" that differs significantly from the existing definition. For the purpose of the new effective competition test, an MMDS operator owned by or affiliated with a LEC offers comparable programming in two circumstances: (1) if the MMDS provider offers at least one broadcast channel without an A/B switch or comparable device; or (2) if the MMDS provider installs a required A/B switch.[53] The *Order* also implies a set of circumstances where a LEC owned or affiliated MMDS provider *may* offer comparable programming:

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[51]Conference Report at 170.

[52]47 C.F.R. § 76.905(g)

[53]*Order* at ¶ 14.

> Inclusion of broadcast channels on the MMDS operator's rate card, advertising, or other marketing materials may be evidence that the MMDS operator offers the broadcast channels in accordance with our definition of 'offer' [54]

The *Order* also excludes from the definition of "broadcast channels" any "broadcast programming delivered by satellite (e.g. 'superstations')."[55] The *NPRM* seeks comment on these standards.

B. The Commission Should Not Adopt the Interim Definition.

The Commission should *not* adopt the interim definition of "comparable programming." As recognized in the *NPRM*, "a single definition of 'comparable programming' should apply to both prongs of the effective competition test in which the term is used."[56] The interim rule will impose significantly increased administrative burdens on small cable companies, particularly if it is applied to both effective competition tests. The existing definition with a slight modification remains a more workable standard.

The interim rule will make establishing effective competition problematic in cases involving LEC-affiliated MMDS operators. Application of the definition to all competing providers will substantially exacerbate the problem. Under the interim rule, to establish effective competition, a cable operator must gather evidence concerning how a competitor provides access to broadcast stations. Commission rules provide no authority for cable operators to request such information. Presumably, small cable companies would have to invest in analysis of marketing information, subscriber interviews and other means of gleaning the necessary evidence. Competitors will have the incentive to remain uncooperative so as to make more difficult a cable company's effort to liberate

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[54] *Id.*

[55] *Order* at ¶ 12.

[56] *NPRM at* ¶ 70.

itself from the costs and burdens of regulation. In some cases. LEC-affiliated MMDS operators may attempt to exploit the rules by requiring customers to take some small act that might amount to "installation" of an A/B switch. A cable operator would then bear the burden of showing that the MMDS provider still provided comparable programming, notwithstanding a customer act of "installation."

Universal application of the proposed definition would undermine the effective competition standard. Some delivery vehicles such as DBS do not include a local off-air component. Consequently, the presence of some competitors would never trigger effective competition, keeping cable locked in regulatory shackles, unable to effectively compete.[57]

C. A Slight Modification of the Existing Definition Will Efficiently Effectuate the Act.

Retention of the existing definition, with only slight modification, will help achieve the Commission's goals of adopting clear rules to streamline Commission processes and effectuating the intent of Congress. Under the existing definition. a cable operator can establish comparable programming by a competing provider by producing a rate card showing at least one non-broadcast station. The Commission can amend this definition as follows to maintain this administrative efficiency:

> In order to offer comparable programming within the meaning of this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, <u>including at least one channel of non-broadcast service programming and one channel of broadcast programming</u>. Reception by a subscriber

[57]For example, the Commission has before it a case of an MMDS provider attempting to stifle a cable operator's ability to meet spot competition by seeking enforcement of uniform pricing rules, despite the operator's assertion that effective competition exists. *Tri-Lakes Cable, Monument, Colorado*, Petition for a Determination of Effective Competition, CSR No. 4724-E ("*Tri-Lakes Cable*").

> of a competing multichannel video programming distributor of at least one channel of broadcast programming and one channel of non-broadcast programming creates a presumption of comparable programming

This rule will harmonize the existing rule with the indicated intent of Congress in enacting the new effective competition test This rule will also reduce the administrative burdens and costs on small cable companies that must seek a change in their regulatory status while facing competing providers, LEC-affiliated or otherwise

VII. CABLE-TELCO BUYOUTS: SMALL CABLE NEEDS SPECIFIC WAIVER PRESUMPTIONS AND PROCEDURES.

Section 302(a) of the Act creates new Communications Act § 652 and establishes restrictions on acquisitions and joint ventures involving LECs and cable operators providing cable service within the LEC's telephone service area. The *Order* incorporates the statutory language into Commission rules.[58] SCBA comments on this action because transactions with LECs represent an important source of capital for small cable. The Commission should interpret Section 302(a) so as to not unnecessarily cut off small cable from such transactions

A. The Commission Should Specify That the Income Limit in Section 652(d)(5) Does Not Include Affiliate Income.

Section 652(d)(5) creates an exception for certain transactions involving smaller LEC and smaller cable companies.[59] Because many of SCBA's members provide cable service through small

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[58] *Order* at ¶ 44.

[59] It states:

> a local exchange carrier with less than $100,000,000 in annual operating revenues (or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier) may purchase or otherwise acquire more than a 10 percent financial interest in, or any management interest in. or enter into joint venture

systems in generally nonurbanized areas, application of this exception is critical to opening up opportunities to obtain capital from a LEC that does not qualify for the extremely restrictive exception for rural systems in Section 652(d)(1).

The Commission can adopt a standard for application of Section 652(d)(5) specifying that the $100 million annual operating revenue threshold is applied only to the LEC *or* its affiliate that transacts with a qualifying cable company. The Commission should clarify that the $100 million annual operating revenue threshold is not an aggregation of all operating revenue from the LEC and all its affiliates. Both the statutory language and Congressional intent support this.

The plain language of Section 652(d)(5) specifies that the relevant annual operating revenue is that of the LEC. Congress did not specify that affiliates revenues were to be included. If the LEC qualifies, so do its affiliates. This contrasts with Section 301(c)(2) where Congress specified that the $250 million small cable company threshold measured the gross revenues of an affiliate. This reflects Congressional intent to allow non-Tier I LECs to invest in qualifying cable companies in excess of a 10% financial interest.

The Commission will further its objectives of adopting clear rules to streamline its processes and establishing certainty for cable operators by specifying that the annual revenue threshold applies to LEC revenue or the revenue of the affiliate that transacts with the cable company. This will create

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> or partnership with, any cable system within the local exchange carrier's telephone service area that services no more than 20,000 serves no more than 20,000 cable subscribers, if no more than 12,000 of those subscribers live within an urbanized area, as defined by the Bureau of the Census.

certainty for parties that qualify for the exception and facilitate efficient transactions that provide capital for small cable systems serving nonurban areas

B. The Commission Should Establish Presumptions and Expedited Procedures for Small Cable Company Waivers.

Section 652(d)(6) provides that the Commission may waive the buy-out restrictions in certain circumstances. The waiver provisions are particularly important for small cable companies that do not qualify for the exceptions in Section 652(d)(1) or (5). The Commission should promulgate presumptions and expedited procedures for a waiver process for small cable companies. To require a protracted, fact-intensive proceeding to obtain a waiver will effectively exclude many small cable companies from the waiver process. They cannot afford the administrative burdens and costs of a Commission proceeding.[60] Moreover, LEC investors are less likely to commit to a transaction when consummation will remain subject to the results of a Commission proceeding of unspecified duration.

Consequently, SCBA proposes that the Commission adopt rules that make a waiver a realistic possibility for small cable

First, the Commission should establish a presumption when a waiver petition is submitted by a small cable company as defined by Section 301(c)(2) of the Act. In such cases, the Commission should presume that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The record before the Commission shows that small cable companies have a much more difficult time accessing capital and that access to capital is critical for

[60]See *Small System Order* at ¶55.

upgrading plant and expanding services.[61] No portion of the record suggests any tendency by small cable to engage in anticompetitive conduct that would suggest a need for a prophylactic measure to protect the public interest. To the contrary, the Commission has recognized the public interest in a healthy small cable industry.[62] Facilitating efficient investment in small cable by certain LECs will serve this interest.

Second, the Commission should establish a procedural framework that provides investors and cable operators with certainty. An adaptation of the Form 1230 process provides a model. The Commission should establish a 90-day decision period at both the LFA and Commission levels. If a waiver petition is not acted upon during this period, it should be deemed approved. To assist in the protection of subscribers' interests, LFAs or the Commission could toll this period with a bona fide request for additional information. Small cable companies should have the procedural option of the interlocutory appeal of an LFA information request to the Commission.

With these rules in place, small cable companies will have additional access to sources of capital from LECs in cases where any evidence of the anticompetitive effects of the transaction are negligible.

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[61]See *Small System Order* at ¶28.

[62]See generally, *Small System Order*.

VIII. TECHNICAL REQUIREMENTS: COMMISSION REGULATIONS SHOULD CLARIFY THAT LFAs CAN NO LONGER MANDATE SPECIFIC SYSTEM TECHNOLOGY.

Section 301(e) of the Act preempts state and LFA authority over a cable system's use of any type of subscriber equipment or transmission technology [63] This represents a significant step toward allowing market forces and customer preference to determine system technology, rather than local regulators. The Commission seeks comment on how Section 301(e) affects the cable franchising, renewal or transfer process [64]

A. The Commission Can Readily Reconcile Section 301(e) with Other Provisions of the Communications Act.

The Commission can reconcile Section 301(e) and other provisions of the Communications Act in ways that maximize market forces and minimize the distorting effects of regulatory interference. Particularly for small cable companies, LFA specified subscriber equipment and plant technology impose substantial burdens on an operator's ability to respond to consumer preference and competition. Many SCBA members have faced franchise renewal negotiations where an LFA conditions a grant of renewal on extremely specific technical upgrades of system plant and electronics, often based on a municipal consultant's opinion as to the "state of the art" to which the municipality is "entitled." Similarly, many LFAs impose requirements that if a cable operator upgrades technology in a neighboring system, it must do the same in the system regulated by the LFA. These types of mandated technological upgrades skew efficient allocation of resources. They either

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[63]Section 301(e) replaces the last two sentences of 47 U.S.C. § 544(e) with "No state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment of any transmission technology "

[64]*NPRM* at ¶ 104.

create disincentives to upgrade or result in upgrades for which subscribers do not care to pay. In either case, a small cable company's ability to compete is impaired.

B. Reconciling Franchise Renewal and Grant Provisions.

Consequently, the Commission can reconcile Section 301(e) with the renewal and transfer provisions as follows:

- Under 47 U.S.C. § 546(c)(1)(B), as part of formal renewal proceedings, an LFA can consider the quality of an operator's service, including signal quality. The Commission should find that under Section 301(e), an LFA *cannot* consider the operator's selection of subscriber equipment and transmission technology. As a practical matter, most small cable companies upgrade bandwidth, electronics and plant as capital to do so becomes available and customers appear willing to pay for such upgrades. Allowing local regulators to second guess selection of equipment and transmission technology during franchise renewal interferes with market determination of efficient investments in equipment and plant.
- Under 47 U.S.C. § 546(c)(1)(C), as part of formal renewal proceedings, an LFA can consider an operator's technical ability insofar as it relates to an operator's proposal. For example, an LFA might consider if a cable company has adequately trained personnel to install, operate and service equipment and transmission technology specified *by the operator*. Under Section 301(e), the Commission should find that an LFA cannot use "consideration of technical

ability" as a means to require specified subscriber equipment and transmission technology.

- Under 47 U.S.C. § 546(b)(2), an LFA may require submission by an operator of a renewal proposal that includes "proposals for an upgrade of the cable system." The Commission can also readily reconcile this section with Section 301(e). Section 546(b)(2) is expressly subject to section 544, which now prohibits an LFA from requiring use of any type of subscriber equipment or transmission technology. Insofar as an LFA mandated renewal proposal requires upgrades in such equipment, it is preempted by Section 544. LFAs may still seek proposals that include system upgrades, but such proposals cannot require specific equipment and transmission technology including required bandwidth. Investments in such capital intensive assets should be market-driven, not regulator driven.

The same interpretations can apply to the provisions of 47 U.S.C. § 541(a)(4) regarding an LFA requiring "adequate assurance that the cable operator has the [technical] qualifications to provide cable service."

By clarifying these interpretive issues in this way, the Commission can effectuate the intent of Congress and provide small cable and investors with certainty. The Commission can make clear that local regulators cannot demand inefficient allocation of resources in customer equipment and transmission technology.

IX. OTHER MATTERS: DEREGULATED SMALL CABLE COMPANIES SHOULD NOT BE SUBJECT TO THE UNIFORM RATE REQUIREMENT.

The Commission seeks comment on proposals to ease the burdens of regulation.[65] SCBA requests that the Commission consider one proposal that will fully implement Congress' intent to remove the burdens of rate regulation from many small cable systems. In conjunction with the rules implementing the small cable company provisions of the Act, SCBA proposes that the Commission remove the uniform rate requirement from deregulated small cable companies.

Removing the uniform rate requirement from deregulated small cable companies will be fully consistent with the Act, Congressional intent and the Commission's goal of streamlining regulation. The Act codifies the result of *Time Warner Entertainment Co. v. FCC* and removes the uniform rate requirement from systems that are deregulated due to effective competition.[66] As stated in the *Order*, since the 1992 Cable Act

> regulation of cable television has been guided by Congress's intent to 'rely on the marketplace, to the maximum extent feasible . . .' The 1992 Cable Act required the Commission to prescribe rate regulations that protect subscribers from having to pay unreasonable rates by ensuring that rates for regulated services do not exceed rates that would be charged in the presence of effective competition. . . Where effective competition is present, certain other regulatory requirements also become inapplicable, including the uniform rate requirement . . . .[67]

Section 301(c) of the Act shows that Congress concluded that certain small systems shall no longer remain subject to rate regulation. Because Congress has obviated the need for LFA or Commission

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[65] *NPRM* at ¶ 112.

[66] 56 F.3d 151, 189 (D.C. Cir. 1995).

[67] *Order* at ¶ 5.

rate regulation for these systems, any need to maintain the uniform rate requirement also becomes questionable.

As shown by at least one case currently before the Commission involving a small cable company, MVPDs are now using the uniform rate requirement to attack small cable competitions.[68] In *Tri-Lakes Cable*, American Telecasting, Inc., the nation's largest MMDS company, is attempting to use the uniform rate requirement to threaten and harass a small cable competitor that offers promotional and introductory discounts. After escalating threats from ATI, Tri-Lakes had little choice but to invest in the filing of a petition for determination of effective competition. This represents a substantial investment for a cable company serving a franchise area of 372 occupied households![69] The Commission could remove this anticompetitive weapon against small cable competitors by finding that small systems that are completely rate deregulated are no longer subject to the uniform rate requirement.

SCBA believes there is no information before the Commission that suggests any conduct by small cable companies eligible for deregulation warranting imposing the uniform rate requirement on such companies. Removal of the requirement for such companies will reduce unnecessary regulation and permit small cable to more efficiently compete

X. CONCLUSION

As indicated in these Comments, the Commission can implement the Act in a manner that provides meaningful relief to small cable. SCBA has outlined the pitfalls the Commission should avoid and has provided concrete suggestions for substantive and procedural regulations. SCBA

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[68] *Tri-Lakes Cable*, supra.

[69] 1990 Census data.

remains ready to provide the Commission with any additional information to assist in the proper implementation of the Act's small cable provisions.

Respectfully submitted,

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